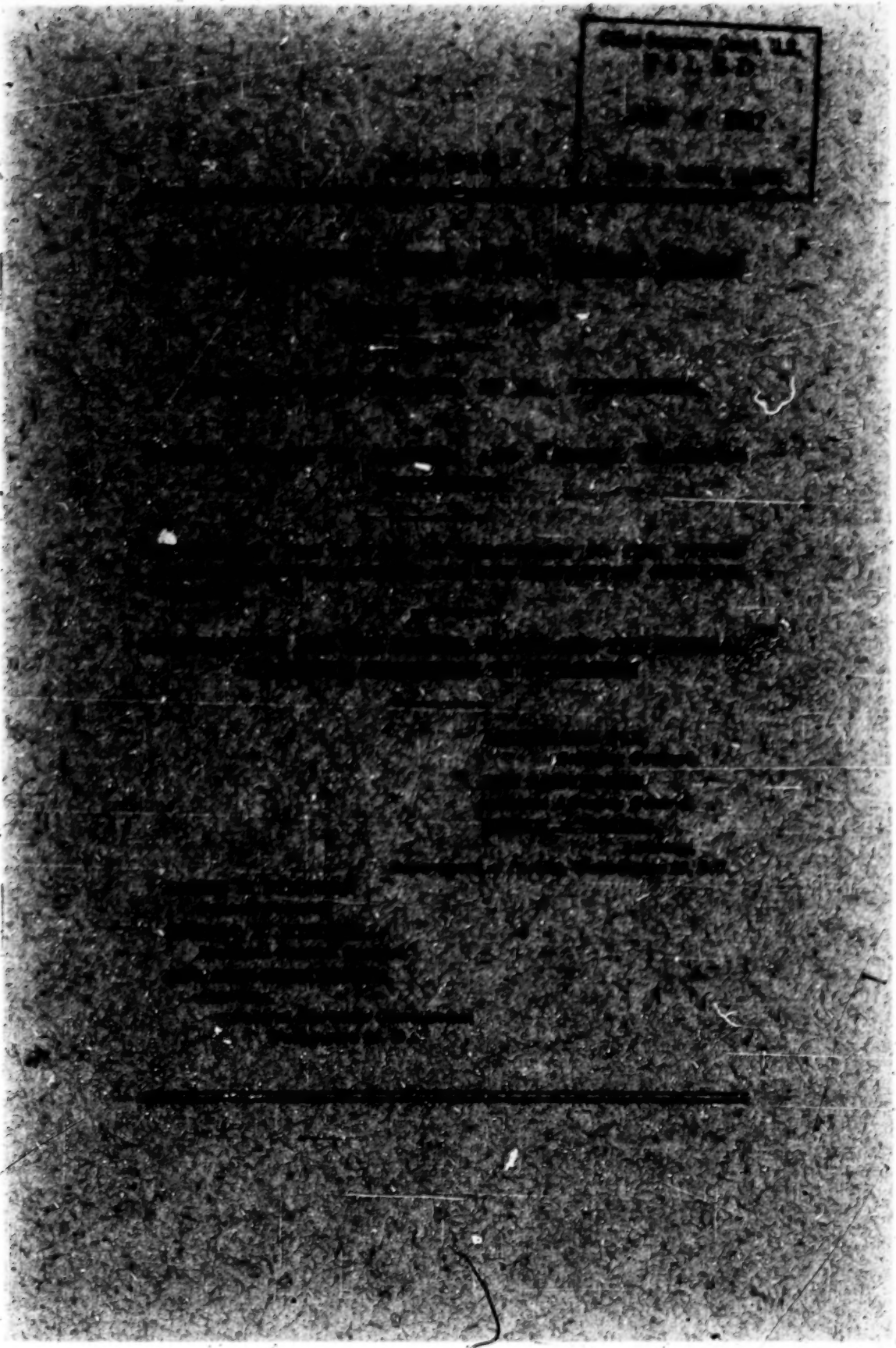

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 913

ANCHOR LINE, LIMITED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL MARITIME COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

Section 15 of the Shipping Act, 1916 (46 U.S.C. 814), requires common carriers by water engaged in transportation between the United States and foreign countries to file with the Federal Maritime Board[1] all agreements with other carriers fixing rates, allocating ports, establishing cooperative working arrangements, or the like; declares that such agreements shall be lawful only when approved by the Commission; and makes it unlawful to carry out any agreement

[1] On August 12, 1961, pursuant to Reorganization Plan No. 7 (§ 304, 26 Fed. Reg. 7315), the Board's functions were transferred to the Federal Maritime Commission, but we will refer to the Board as it was constituted at the time of these proceedings.

that has not been so approved. Acting on the complaint of competing lines, the Board found that the petitioner lines had, without the approval of the Board, entered into and carried out agreements fixing rates, allocating ports, and establishing joint working arrangements in the trade between the United Kingdom and United States ports on the Great Lakes (J.A. 479–498). As authorized by § 22 of the Act, the Board entered an order directing petitioners to abstain from the violations found (J.A. 499). The court of appeals affirmed (Pet. A1–A3).

1. Petitioners' main argument (Pet. 10–14) goes, not to whether there was a violation, but to *when* it began. The Board stated that the violation commenced when the agreements were made and the parties failed to comply with the filing requirement; petitioners argue that, assuming the alleged agreements were made, no "violation" of the Act occurred until they were carried out, allegedly at a later date. The short answer is that the date the violations commenced has no bearing on the only order being reviewed in this case—a cease and desist order requiring petitioners to abstain from the violations in the future. How long the violations had continued would be material only in an independent civil action brought by the United States to recover the civil penalties imposed by the last paragraph of § 15 (up to $1,000 "for each day such violation continues"). The Board's findings as to the dates on which the violations began were relevant, not to the order now being reviewed, but only to the direction in its opinion that the findings "be referred to the Department of Justice for appro-

private action." J.A. 128[illegible]. Only if the Attorney General decides to bring such an action and to claim penalties from the dates of the agreements rather than from the dates they were carried out—assuming the dates are different—will there be occasion to decide that question.

2. Petitioner complains that the findings of unauthorized joint workings, agreements and port allocations involved several ports in addition to those specifically named in the complaint (Pet. 14-17). The complaint need not, however, allege each and every detail of the charge. The evidence introduced gave petitioners [illegible] opportunity to cure surprise and to meet the proof. *Kobin v. Civil Aeronautics Board*, 183 F.2d 839, 841-842 (C.A.D.C.); see *National Labor Relations Board v. Mackay Radio and Tel. Co.*, 304 U.S. 333, 349-350.

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* [illegible] in order to be given a hearing for penalties under § 2 [illegible] Board on a cease and desist proceeding under § 2 [illegible] Board's findings [illegible] Board's order for the payment of reparations. Whatever the effect of the Board's [illegible] it seems clear that the question of statutory interpretation urged by petitioners was within the Board's [illegible] and [illegible] would be fully open to them in any action for penalties.

Petitioners [illegible] certain of the violations began [illegible] to the later period. In any event, as now to point [illegible] the violations complained [illegible] immaterial.

3. Petitioners assert procedural defects in the Board's reconsideration, on its own motion, of an earlier decision which had found the evidence insufficient to establish the violations and dismissed the complaint (Pet. 17–22). The first decision of the Board had been by a 2–1 vote, with Board Member Guill, whose term of office expired on December 31, 1959, being one of the majority. The decision was dated December 14, 1959, but was not issued until March 2, 1960 (J.A. 425–456). A petition for review was filed in the court of appeals alleging that no decision had been entered until after Member Guill's term had expired and that there was therefore no competent majority vote (J.A. 461–463). Thereafter the Board, with two new members (Chairman Morse having also resigned in the interim), reopened the proceedings on its own motion as authorized by § 25 of the Act (J.A. 464). After reargument, the Board entered its new decision, in which it recited that the proceedings had been reopened "as the result of" the appeal challenging Member Guill's competence (J.A. 479). The new decision, as stated above, sustained the complaint.

Rule 16(a) of the Board's rules provides that the Board may, on its own motion, reopen a proceeding for reconsideration "if it finds such action is required by changed conditions in fact or law or by the public interest." 46 C.F.R. 201.261. Petitioners contend that the reopening was unauthorized because the Board made no formal findings to that effect. No

such objection was made before the Board, however, and the court of appeals properly refused to consider it. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 389. In any event, the Board's opinion on reconsideration clearly indicated that the proceeding was reopened because of the challenge, which the Board apparently considered to be well made, to Member Guill's competence, thus satisfying any assumed requirement that the reasons for reopening be announced.

Petitioners also object that the Board, in reversing the prior order, did not spell out its reasons for disagreeing with its predecessor. There is no requirement that it do so, and its report makes clear in any event that the disagreement was simply a difference in the evaluation of the evidence and the inferences of concerted action to be drawn from it.

4. Contrary to petitioners' suggestion (Pet. 22), there is no issue in this case whether a "person who does not undertake the carriage of cargo [is] a 'common carrier' * * *."[1] The Board found that petitioner Anchor Line did hold itself out to carry cargo

[1] This issue is raised only with respect to petitioner Anchor Line which claimed that it was merely a loading broker and for that reason not required to obtain approval for a Section 15 agreement. There is no question as to the status of the other petitioners as common carriers.

(J.A. 493–496). The finding was based on Anchor Line's advertising, its representations to shippers and other behavior indicating an assumption of the obligations of common carriage (J.A. 131–137, 181, 185, 189, 193, 195, 248, 316–318) and the failure of Anchor Line to show that its undertaking to carry was really meant to be limited, notwithstanding that its holding out to carry was unlimited (J.A. 496).

5. Petitioners' final claim that the Board's findings were not supported by substantial evidence plainly presents no question appropriate for review by this Court. That is a question "which Congress has placed in the keeping of the Courts of Appeals" (*Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401), and the court of appeals here has found ample evidence to support the findings.

Contrary to petitioners' assertion (Pet. 22–23), the Commission's second report does not represent a change from the first report in the standard for determining common carrier status; it represents rather a difference in the appraisal of the evidence.

Petitioners are mistaken insofar as they suggest (Pet. 23) that status as "common carrier by water" depends on ownership or control of the means of transportation. *Ulmatia Co.* v. *Porto Rican Express Co.*, 3 F.M.B. 771, 775–776. See also *Board of Kentucky* v. *Adams Express Co.*, 93 U.S. 174.

Petitioners allege several discrepancies, concerning two of the eight petitioners, between statements in Board's decision and certain evidence. As the court of appeals held, the "discrepancies, if such they be, are too insubstantial to affect our decision" (Pet. A3, n. 3).

There is admittedly no conflict of decisions and no other reason for review by this Court appears. The petition for certiorari should be denied.

Respectfully submitted.

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